Supreme Court of the United States

October Term, 1969

No. 1431

WILLIAM CORWIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

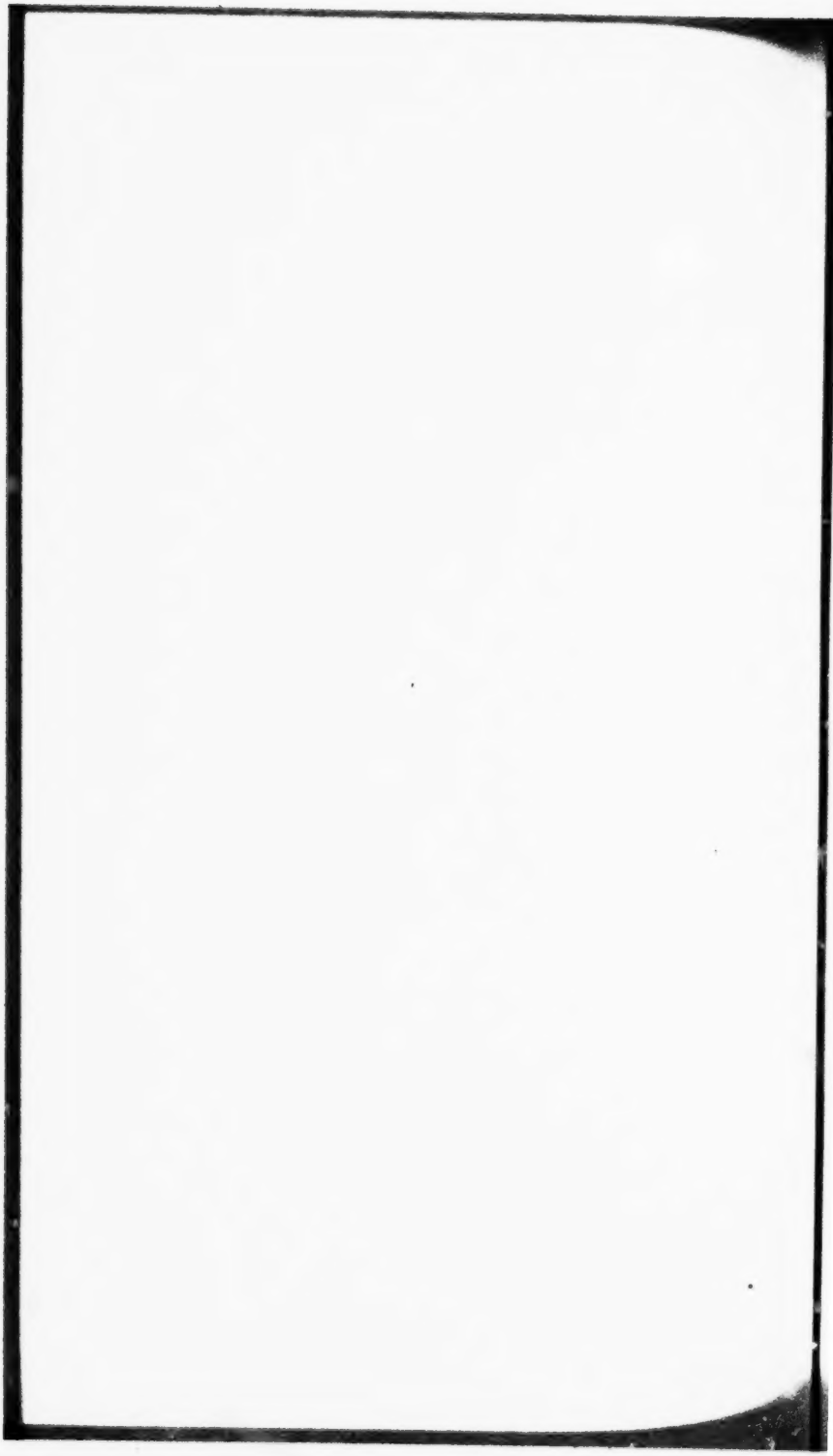
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BURTON MARKS
9720 Wilshire Blvd., [illegible]
Beverly Hills, [illegible]
Telephone [illegible]

Attorney for [illegible]

Offset printed by: [illegible] Co., [illegible]



TOPICAL INDEX

	Page
Decisions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
1. Title 21 U.S.C. sec. 176a is violative of the Fifth Amendment privilege against self-incrimination in that it punishes sale of marijuana where the seller has omitted to do certain acts, the omission of which cannot be punished due to the Fifth Amendment	4
2. Where a defendant pleads guilty to the violation of a statute because of a misplaced belief in the validity of that statute, allowing the subsequent conviction to stand is a denial of due process of law	5
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases	Page
Caudillo v. United States, 253 F.2d 513, cert. denied 357 U.S. 931	5
Costello v. United States, 324 F.2d 260	5
Johnson v. Zerbst, 304 U.S. 458	5
Leary v. United States, 383 F.2d 851, reversed 395 U.S. 6	4, 5
United States v. Covington, 395 U.S. 57	4
United States v. Gibson, 310 F.2d 79	5
Williams v. United States, 290 F.2d 451	5
Zaragoza v. United States, 389 F.2d 469	5

Statutes	
United States Constitution Fifth Amendment	2, 4
21 U.S.C. 176a	2, 3, 4, 5
26 U.S.C. 4741	2, 4
26 U.S.C. 4742	2, 4
26 U.S.C. 4742a	3
28 U.S.C. 1254(1)	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. .....

WILLIAM CORWIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in *Corwin v. United States,* No. 23,104, attached hereto as Appendix "A," is as yet not available in the Federal Reporter.

JURISDICTION

The judgment of conviction was entered on May 13, 1968 and was affirmed by the United States Court of Appeals for the Ninth Circuit on February 17, 1970. An order extending time to file this petition, to and including April 16, 1970, was issued by Mr. Justice Douglas on March 25, 1970.

Jurisdiction is conferred by 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether 21 U.S.C. sec. 176a is violative of the Fifth Amendment and the privilege against self-incrimination, in that sale of marijuana "with intent to defraud the United States," as set forth in section 176a, means sale of marijuana not pursuant to the Treasury order form required by 26 U.S.C. sec. 4742 or sale of marijuana without payment of the tax required by 26 U.S.C. sec. 4741, and said tax and order form requirements are themselves violative of the Fifth Amendment?

2. Where a defendant pleads guilty because of a mistaken belief in the validity of a statute, is it a denial of due process to allow the subsequent conviction to stand when the statute is invalidated?

STATUTE INVOLVED

Title 21 U.S.C. sec. 176a provides as follows:

> ". . . whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana

BLEED THROUGH POOR COPY

after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

". . ."

21 U.S.C.A. at p. 210 (West 1961).

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Central District of California for sale of marijuana in violation of 21 U.S.C. sec. 176a (three counts) and 26 U.S.C. sec. 4742a (one count). He moved the court to dismiss the indictment on the grounds that section 176a violated his privilege against self-incrimination, in that the acts required by federal law, the omission of which would make a sale one with "intent to defraud the United States" (*i.e.*, payment of tax and sale pursuant to an order form), created a hazard of self-incrimination, and that section 176a punished only those who failed to do those self-incriminating acts. The motion to dismiss was denied, and petitioner pled guilty to count two, which alleged a violation of section 176a. The other three counts were then dismissed on motion of the

government.

REASONS FOR GRANTING THE WRIT

1. **Title 21 U.S.C. sec. 176a is violative of the Fifth Amendment privilege against self-incrimination in that it punishes sale of marijuana where the seller has omitted to do certain acts, the omission of which cannot be punished due to the Fifth Amendment.**

Title 21 U.S.C. sec. 176a purports to punish sale of marijuana "with intent to defraud the United States." Petitioner contends that sale of marijuana "with intent to defraud the United States" can have no other meaning than sale of marijuana not pursuant to the Treasury order form required by 26 U.S.C. sec. 4742 or sale of marijuana without payment of the tax required by 26 U.S.C. sec. 4741.

Since the tax and order form requirements of Title 26 create a substantial hazard of self-incrimination, *Leary v. United States*, 395 U.S. 6 (1969), a seller of marijuana may rely upon his Fifth Amendment privilege as a complete defense to a prosecution for failure to pay the tax or use the order form. *Leary v. United States, supra; United States v. Covington*, 395 U.S. 57 (1969).

It would be anomalous indeed to hold, as this Court has, that the Fifth Amendment is a complete defense to prosecution for failure to pay the tax on marijuana and then allow the government to prosecute those who possess marijuana with "intent to defraud the United States" (26 U.S.C. 176a) when such intent is evidenced by the failure to pay

BLEED THROUGH POOR COPY

the tax; by the assertion of a constitutional privilege.

2. **Where a defendant pleads guilty to the violation of a statute because of a misplaced belief in the validity of that statute, allowing the subsequent conviction to stand is a denial of due process of law.**

At the time of his guilty plea, petitioner felt that the statute to which he pleaded guilty, 21 U.S.C. sec. 176a, was constitutionally valid. The Ninth Circuit Court of Appeals had repeatedly so held (see, *e.g.*, *Zaragoza v. United States*, 389 F.2d 468 (9th Cir. 1968); *Williams v. United States*, 290 F.2d 451 (9th Cir. 1961); *Caudillo v. United States*, 253 F.2d 513 (9th Cir.), *cert. denied* 357 U.S. 931 (1958)), as had the other United States Courts of Appeals (see, *e.g.*, *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *reversed* 395 U.S. 6 (1969); *Costello v. United States*, 324 F.2d 260 (10th Cir. 1963); *United States v. Gibson*, 310 F.2d 79 (2d Cir. 1962)).

A plea of guilty to a statute believed to be valid is like the waiver of an unknown right. The plea here, like the waiver in *Johnson v. Zerbst*, 304 U.S. 458 (1938), should be considered in light of the circumstances surrounding it. Where it is unlikely that a defendant would have pled guilty had the state of the law not been as it was at the time of his plea, it is submitted that his case should be remanded for a determination as to the basis of his plea.

Petitioner contends that it is in the interest of the federal courts to allow defendants the freedom to knowingly and intelligently plead guilty to crimes which they feel that they have committed, and that this interest would be

furthered by a decision of this Honorable Court that such pleas are not a waiver of the right to attack the statutes involved.

CONCLUSION

The petition for writ of certiorari should be granted and the case reversed, either: (i) to the Ninth Circuit Court of Appeals to determine the appeal as if the plea of guilty had not been entered, or, (ii) to the District Court with instructions to permit the petitioner herein to withdraw his plea of guilty if he so desires.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner